85-2099

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1986

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

DOROTHY FINLEY,
Respondent

**PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA**

GAELE McLAUGHLIN BARTHOLD
Deputy District Attorney
(Counsel of Record)
ANN C. LEBOWITZ
Assistant District Attorney
RONALD EISENBERG
Chief, Appeals Division
WILLIAM G. CHADWICK, JR.
First Asst. District Attorney
RONALD D. CASTILLE
District Attorney
Philadelphia County

1300 Chestnut Street
Philadelphia, Pa., 19107
(215) 875-6010

June 20, 1986

65pp

QUESTIONS PRESENTED

1. Does an indigent criminal defendant's sixth amendment right to a meaningful first appeal pursuant to Anders v. California, 386 U.S. 738 (1967), extend to state court collateral review proceedings?

2. Where defendant's conviction was affirmed by the Pennsylvania Supreme Court in a counselled direct appeal, and newly appointed counsel found no issues on which to base a subsequent claim for collateral relief, do the sixth and fourteenth amendments require appointed counsel to file an advocate's brief or petition with the post-conviction hearing judge?

3. Are indigent criminal defendants, who have no federal constitutional right to counsel on collateral review, entitled to compel post-conviction litigation of claims which appointed counsel deems non-meritorious?

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1986

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

DOROTHY FINLEY,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA

Petitioner, the Commonwealth of Pennsylvania, respectfully requests that a Writ of Certiorari issue to review the final Judgment and Opinion of the Superior Court of Pennsylvania, which is the highest state court to render a decision on the merits of this case.

The Pennsylvania Superior Court entered its decision on June 22, 1984. Petitioner then timely applied to the Pennsylvania Supreme Court for discretionary state court

review. Petitioner's application was initially granted, and the case was fully briefed and argued at the October 1985 Session of the Pennsylvania Supreme Court. Thereafter, by Order dated April 23, 1986, the Pennsylvania Supreme Court inexplicably dismissed the appeal as "improvidently granted" (Order attached as Appendix A at 1A-2A). Because under Pennsylvania law this was not a decision on the merits, Commonwealth v. Britton, 506 A.2d 895 (Pa. 1986); Dayton v. Dayton, 506 A.2d 901 (Pa. 1986); Commonwealth of Pennsylvania Liquor Control Board v. Ronnie's Lounge, Inc., 485 Pa. 72, 400 A.2d 1317 (1979), the writ of certiorari, if allowed, is appropriately directed to the intermediate state appellate court. See e.g. Pennsylvania v. Henderson, 446 U.S. 905 (1980).

OPINIONS BELOW

The Opinion and Judgment of the Pennsylvania Superior Court, which is officially reported at 330 Pa. Superior Ct. 313, is set forth in full in Appendix B at 1B-19B. The Opinion of the Philadelphia Court of Common Pleas, which was filed on February 22, 1983, but is unreported, is set forth in full in Appendix C at 1C-14C.

STATEMENT OF JURISDICTION

The Judgment of the Superior Court of Pennsylvania was entered on June 22, 1984. The Pennsylvania Supreme Court, by Order entered April 23, 1986, declined to exercise authority in the case.[1]

---

[1]The Judgment on which review is sought was entered by a three-judge panel of the Pennsylvania Superior Court. Pursuant to this Court's decision in Local 174, Teamsters v. Lucas Flour Company, 369 U.S. 95, 89-100 (1962), the judgment of a panel or division of the appropriate appellate court is reviewable on certiorari if

(Footnote 1 continued on next page.)

The jurisdiction of this Court to review the judgment of the Superior Court of Pennsylvania is invoked pursuant to 28 U.S.C. §1257(3).

(Footnote 1 continued from previous page.) that was the highest state court in which a decision could be had. Under Pennsylvania practice, cases are heard before the Superior Court en banc or by a panel "as determined by the court in its discretion." Pa.R.A.P. 3721. There is no right to reargument of a panel decision before the en banc court, Pa.R.A.P. 3723, nor is a request for en banc reargument a prerequisite to discretionary review in the state supreme court. Pa.R.A.P. 1113. Since the state supreme court ultimately declined to review this case, the Superior Court panel is the highest state court in which a decision on the federal questions could be had. American Railway Express Co. v. Levee, 263 U.S. 19 (1923); Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 678 n.1 (1968).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment Six, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial ... and to have the assistance of counsel for his defense.

United States Constitution, Amendment Fourteen, which provides:

> ... No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent was convicted of second-degree murder in this 1975 drug related homicide wherein the victim was shot and killed inside his home. Respondent, represented by court-appointed counsel,

successfully litigated a pre-trial motion to suppress the statements she made to police on the night of her arrest. Respondent's motion to suppress the murder weapon, which was seized from her apartment pursuant to a search warrant, was denied. Following disposition of these pre-trial motions, respondent's case was listed for trial before a judge unfamiliar with the contents of the suppressed evidence. Respondent then waived her right to a jury trial.

After a lengthy bench trial at which counsel presented several witnesses on respondent's behalf, the trial judge resolved the credibility issues adversely to respondent and convicted her of second-degree murder, robbery, criminal conspiracy and weapons offenses. Still represented by her appointed trial counsel, respondent

appealed to the state supreme court.[2] That court, rejecting the arguments raised in counsel's full brief on the merits, unanimously affirmed the judgment of sentence. Commonwealth v. Finley, 477 Pa. 211, 383 A.2d 898 (1978).

Respondent next filed a pro se Post Conviction Hearing Act petition in the Philadelphia Court of Common Pleas. Respondent's post-conviction petition raised precisely the same issues previously rejected by the state supreme court on direct appeal. Because the issues had been finally litigated under former 19 P.S. §1180-4, reenacted as 42 Pa.C.S.A. §9544, the Common Pleas Court summarily denied respondent's petition without a hearing and without the appointment of counsel. Respondent, through new appointed counsel,

---

[2]Under prior Pennsylvania practice, the state supreme court had direct appellate jurisdiction in homicide cases.

again appealed to the state supreme court. This appeal did not identify any substantive claims of error. Respondent, however, successfully argued that the lower court erred when it summarily denied post-conviction relief without appointing counsel. The state supreme court remanded the case to the Court of Common Pleas with instructions to determine whether respondent was indigent and, if so, to appoint counsel for proceedings under the Post Conviction Hearing Act. Commonwealth v. Finley, 497 Pa. 332, 440 A.2d 1183 (1981), reargument denied.

Pursuant to this state supreme court directive, the lower court, on remand, appointed new post-conviction counsel. Respondent's new attorney reviewed the notes of testimony and consulted with his client. Based on his advocate's review of the record, new counsel concluded that there was no even arguable basis for

collateral relief. Counsel so advised the court by letter and requested permission to withdraw from the case. Counsel's letter also advised the court regarding the two finally litigated claims which respondent wished to pursue.

Upon receipt of counsel's letter, the post-conviction court conducted its own independent review of the case and similarly concluded that the record was devoid of arguably meritorious issues under the state Post Conviction Hearing Act. The post-conviction judge specifically refused to compel appointed counsel to present frivolous collateral claims. The court reasoned that such a requirement debases the legal profession, undermines the integrity of the judicial system, and fails to benefit the indigent defendant. The Common Pleas Court thus permitted counsel to withdraw, and dismissed respondent's Post Conviction Hearing Act petition.

Respondent, through yet another appointed counsel, appealed this dismissal to the Pennsylvania Superior Court. On June 22, 1984, a panel of that court remanded the case for further post-conviction proceedings on the ground that prior post-conviction counsel had failed to comply with the technical requirements of Anders v. California, 386 U.S. 738 (1967). The state supreme court subsequently declined to exercise its discretionary authority in the case.

Because Anders is inapplicable to collateral attacks on criminal convictions, and because there is no constitutional mandate for the litigious merry-go-round sanctioned by the court below, the Commonwealth of Pennsylvania now seeks this Court's review.

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS AN IMPORTANT OPPORTUNITY TO DECIDE A QUESTION LEFT OPEN BY THE COURT'S DECISION IN ANDERS V. CALIFORNIA AND DEFINITIVELY TO INSTRUCT THE STATE COURTS THAT ANDERS IS INAPPLICABLE TO COLLATERAL PROCEEDINGS.

In Anders v. California, 386 U.S. 738 (1967), this Court, endorsing a policy of withdrawal from frivolous cases, established specific briefing and notice requirements to insure that indigent criminal defendants would have a meaningful right to counsel in a first state court appeal.[3] Anders, however, does not address the issue of appointed counsel's responsibilities where he seeks to withdraw on collateral review. This case presents the issue left undecided by Anders.

---

[3] See Polk County v. Dodson, 454 U.S. 312, 323 (1981), where this Court expressed the view that retained and appointed lawyers have the same professional obligation not to pursue frivolous motions and appeals.

Pennsylvania, slavishly adhering to a misguided tendency to declare all rights absolute, Ross v. Moffitt, 417 U.S. 600, 611-612 (1974), here wrongly extended the Anders direct appeal requirements to collateral review of respondent's well-founded murder conviction, despite the fact that respondent had already been afforded a counselled direct appeal on the merits.[4] In thus applying Anders where it is inapplicable, the state court ordered an unwarranted remand for additional post-conviction proceedings because respondent's

---

[4]The Pennsylvania decision below relies exclusively on this Court's interpretation of the federal constitution in the Anders case, and on state cases which, in turn, are based on federal precedent. See Commonwealth v. Lohr, 503 Pa. 130, 468 A.2d 1375 (1983); Commonwealth v. McClendon, 495 Pa. 467, 434 A.2d 1185 (1981); Commonwealth v. Baker, 429 Pa. 209, 239 A.2d 201 (1968). Even where state grounds are intermixed in a lower court's holding, the state court's reliance on federal grounds warrants review by this Court. Oregon v. Kennedy, 456 U.S. 667 (1982).

new court-appointed attorney, having concluded that there were no even arguably meritorious issues on which he could assert a claim for collateral relief, failed to follow Anders' irrelevant formal requirements.

Under Anders, counsel seeking to withdraw from an appeal he deems frivolous must supply the reviewing court with an advocate's brief "referring to anything in the record that might arguably support the appeal." Anders at 744. By imposing these formal requirements, Anders thus guaranteed that an indigent's then recently recognized constitutional right to counsel in a first state court appeal, Douglas v. California, 372 U.S. 353 (1963), would not become an empty ritual. There is, however, no similar constitutional right to counsel on collateral review of a criminal conviction. Evitts v. Lucey, 105 S.Ct. 830, 834 (1985) (right to counsel limited to first appeal

as of right); Ross v. Moffitt, 417 U.S. 600. Hence, neither Anders nor its due process underpinnings are applicable here.[5]

Moreover, insofar as Anders is grounded on the equal protection clause, subsequent decisions abundantly demonstrate that the states have no constitutional obligation to duplicate for indigents the same legal

---

[5]Of course, the states may choose as a matter of state law to provide counsel to indigents even on collateral review. Under Pennsylvania procedural rules, indigent defendants have an absolute right to appointed counsel on the first post-conviction petition, and in subsequent petitions which raise new issues. Pa.R.Crim.P. 1503 and 1504. Since this right to counsel is based only on state law, the formal requirements mandated by Anders do not apply as a matter of constitutional principle. Rather, if the state decides to require some certification that counsel has fulfilled his role as an advocate, it may do so in any manner it deems appropriate -- even a "no merit" letter to the judge. Finally, because Pennsylvania imposes no limit on the number of post-conviction petitions which a convicted defendant may file, a defendant who believes he has been slothfully represented by his post-conviction counsel can simply address a new petition to the court.

arsenal available to the wealthy. Ross v. Moffitt, 417 U.S. at 616. See Nichols v. Gagnon, 454 F.2d 467, 472 (7th Cir. 1971), cert. denied, 408 U.S. 925 (1972) (Stevens, J.) ("Every defendant does not have the constitutional right to be represented by Clarence Darrow."); Slawek v. United States, 413 F.2d 957, 960 (8th Cir. 1969) (Blackmun, J.) (fact that rich defendants may waste money on unnecessary and foolish trial steps, does not give the indigent the right to squander government funds).

Furthermore, a review of so-called "Anders practice," as it has evolved in several states, demonstrates that its requirements must be clarified and limited, not augmented. Indeed, while one commentator has described Pennsylvania's Anders practice as particularly "opaque," Hermann, "Frivolous Criminal Appeals," 47 N.Y.U.L. Rev. 701, 708 n.39 (1972),

lucidity is not the hallmark of Anders practice anywhere.[6]

Anders has been severely criticized by defense counsel, whose clients were

---

[6]There are relatively few reported decisions concerning Anders' applicability on collateral review. Of the reported decisions, the most notable is a Seventh Circuit case in which former Associate Justice Clark, who authored Anders, was sitting by designation as a Circuit Judge. United States ex rel. Curtis v. People of Illinois, 521 F.2d 717 (7th Cir. 1975), cert. denied, 423 U.S. 1023 (1975). The former Justice there joined an opinion which unequivocally states that Anders applies only in direct appeals. That case is also significant because Illinois, like Pennsylvania, has encountered considerable difficulty in reconciling the Anders criteria as applied on post-conviction review. Although Illinois has more recently refused to extend Anders to collateral proceedings, People v. McCarly, 17 Ill.App.3d 796, 308 N.E.2d 655 (1974), and has even explicitly rejected the Pennsylvania view, People v. Townsell, 14 Ill.App.3d 105, 302 N.E.2d 213 (1973), its decisions have not been uniform. People v. Belville, 94 Ill.App.2d 286, 236 N.E.2d 760 (1968) (Anders applicable to post-conviction attack on guilty plea). See also State v. Thompson, 139 Ariz. 552, 679 P.2d 575 (1984) (Anders applicable to collateral proceedings when defendant requests delayed appeal).

intended to benefit from the decision.[7] Various state courts have been no less critical. In fact, a number of jurisdictions simply refuse to accept Anders briefs and will not entertain petitions to withdraw, no matter how frivolous the case. Thus, in Colorado, Idaho, Massachusetts and Missouri, counsel must brief every case on the merits, regardless of counsel's assessment of frivolity.[8]

---

[7]According to one career defender, the "schizophrenic" briefing requirements of Anders encourage frivolous appeals, undermine the integrity of the in forma pauperis bar, promote intellectual dishonesty, and delay appellate review of meritorious claims. Doherty, "Wolf! Wolf! -- The Ramifications of Frivolous Appeals," 59 Journal of Criminal Law, Criminology, and Police Science, No. 1, pp. 1-3 (1968). See also Hermann, "Frivolous Criminal Appeals," 47 New York University Law Review 701 (1972).

[8]Colorado: McClendon v. People, 174 Colorado 7, 481 P.2d 715 (1981) (public defender has no right to withdraw); Idaho: State v. McKenney, 98 Idaho 551, 568 P.2d 1213 (1977) (requires brief on the merits;

(Footnote 8 continued on next page.)

While this approach has the apparent advantage of easing the task of the state appeals courts, it has been soundly criticized by at least one current member of this Court, then a Circuit Court judge, as an ill-conceived interpretation of Anders that wrongly endorses an "advocate's charade." Nickols v. Gagnon, 454 F.2d 467, 472 (4th Cir. 1971) (Stevens, J.).

This advocate's charade, and the resulting influx of frivolous litigation,

---

(Footnote 8 continued from previous page.)

no instance where counsel has been permitted to withdraw based on frivolity of appeal); Massachusetts: Commonwealth v. Moffitt, 383 Mass. 201 (1981) (even if an appeal is frivolous, court will expend less time and energy in direct review on the merits; counsel not permitted to withdraw on grounds of frivolousness, but may dissociate himself by so stating in preface); Missouri: State v. Gates, 466 S.W. 2d 681 (Mo. 1971) (court will not grant application to withdraw on grounds of frivolousness; requires briefs on merits). See also Indiana: Dixon v. State, 152 Ind.App. 430, 284 N.E.2d 102 (1972), partially overruled in Music v. State, 489 N.E.2d 949 (Ind. 1986).

must be resolved. The Anders dilemma has yielded such conflicting state court decisions, and has created such a crisis of confidence in the appellate courts that have considered the issue, that this Court must providence guidance. At a minimum, Pennsylvania's unwarranted extension of the Anders criteria to collateral proceedings must now be corrected.[9]

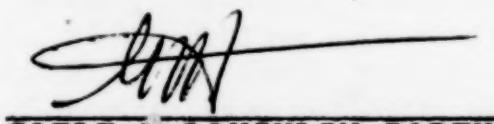
---

[9]On June 11, 1986, the Pennsylvania Superior Court again extended Anders beyond its facial limits by applying Anders requirements to an appeal from a violation of probation. Commonwealth v. Aaron Thomas, No. 436 Philadelphia, 1982, Pa. Superior, slip opinion, filed 6/11/86. Such an ill-considered constitutionally-based enlargement of Anders should not be tolerated. Maybe Pennsylvania practice is especially opaque. See p.15, above.

CONCLUSION

For all the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests that a Writ of Certiorari issue to review the decision below.

Respectfully submitted,



GAELE McLAUGHLIN BARTHOLD
Deputy District Attorney
(Counsel of Record)
ANN C. LEBOWITZ
Assistant District Attorney
RONALD EISENBERG
Chief, Appeals Unit
WILLIAM G. CHADWICK, JR.
First Asst. District Attorney
RONALD D. CASTILLE
District Attorney
Philadelphia County

1300 Chestnut Street
Philadelphia, Pa. 19107
(215) 875-6010

IN THE SUPREME COURT
OF THE UNITED STATES

COMMONWEALTH OF PENN- SYLVANIA, Petitioner	:	OCTOBER TERM, 1986
v.	:	
DOROTHY FINLEY, Respondent	:	NO.

CERTIFICATION OF SERVICE

I, GAELE McLAUGHLIN BARTHOLD, Counsel for Petitioner, hereby certify that on this 20th day of June, 1986, three (3) copies of this Petition for Writ of Certiorari to the Superior Court of Pennsylvania were mailed, postage prepaid, to Catherine M. Harper, Esquire, 800 East Main Street, Lansdale, Pennsylvania 19446, Counsel for Respondent.

GAELE McLAUGHLIN BARTHOLD
Deputy District Attorney
District Attorney's Office
1300 Chestnut Street
Philadelphia, Pa. 19107

Sworn to and subscribed :
before me this 20th day :
of June, 1986, A.D. :

NOTARY PUBLIC

My Commission Expires: 9/19/87

SUPREME COURT OF PENNSYLVANIA

Eastern District

COMMONWEALTH OF PENNSYLVANIA, Appellant	:	No. 14 E.D. Appeal Docket, 1985
v.	:	
DOROTHY FINLEY, Appellee	:	

J U D G M E N T

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the appeal having been improvidently granted, the same is hereby dismissed.

BY THE COURT:

/s/
Marlene F. Lachman, Esq.
Prothonotary

Dated: April 23, 1986

J#154-85
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Appellant	:	No. 14 E.D. Appeal Dkt. 1985
	:	
	:	Commonwealth's Appeal by Permission from the June 22, 1984 Decision of the Superior Court at No. 2978, Philadelphia, 1982, Remanding for an Evidentiary Hearing under the Post-Conviction Hearing Act as of Nos. 1128-1132, May Session, 1975, Philadelphia Court of Common Pleas, Criminal Trial Division
v.	:	
	:	330 Pa. Superior Ct. 313, 479 A.2d 568 (1984)
	:	
DOROTHY FINLEY, Appellee	:	ARGUED: October 23, 1985

ORDER

PER CURIAM **FILED: APRIL 23, 1986**

Appeal dismissed as having been improvidently granted.

J. 17005/84

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
DOROTHY FINLEY, Appellant	:	No. 02978 Philadelphia 1982

J U D G M E N T

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the above captioned matter, of the Court of Common Pleas of PHILADELPHIA County be, and is REMANDED WITH DIRECTIVES.

By the Court:

/s/
J. Daniel Henry
Prothonotary

Dated: June 22, 1984

J. 17005/84

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
DOROTHY FINLEY, Appellant	:	No. 02978 Philadelphia 1982

Appeal from the Order of the Court of Common Pleas, Criminal Division, of Philadelphia County at No. 1128-1132 May Term, 1975.

BEFORE: ROWLEY, POPOVICH AND CERCONE, JJ.

OPINION BY POPOVICH, J.: **FILED JUNE 22 1984**

This is an appeal from an order of the Court of Common Pleas of Philadelphia denying the Petition for Relief under the Post-Conviction Hearing Act (PCHA), 42 Pa.C.S.A. 9541 et seq., of appellant, Dorothy Finley. On October 17, 1975, after a non-jury trial, appellant was convicted of murder in the second degree, robbery, carrying firearms without a license, possessing instruments

of crime, prohibited offensive weapon and criminal conspiracy. Since the convictions involved a homicide, direct appeal was taken to the Pennsylvania Supreme Court, where all the judgments of sentence were affirmed by Per Curiam Opinion at Commonwealth v. Finley, 477 Pa. 211, 383 A.2d 898 (1978). On appeal to the Supreme Court, appellant raised two issues: (1) whether there was sufficient evidence to support the verdicts and (2) whether the search warrant was based on illegally obtained evidence rendering the evidence obtained pursuant thereto inadmissible. The Supreme Court "found no merit in either of these arguments." Commonwealth v. Finley, supra, p. 898.

On April 9, 1979, appellant filed a pro se PCHA petition which merely repeated the allegations raised in direct appeal to the Pennsylvania Supreme Court. This PCHA petition was denied without a hearing and

without appointment of counsel because "[i]n the instant petition the petitioner again raises the precise issues previously raised on appeal...." Opinion, Blake, J., at 2. Subsequently, an appeal of the decision of the PCHA court was taken to the Pennsylvania Supreme Court which vacated the lower court order and remanded the case to the lower court with instructions that counsel be appointed for appellant if she were found to be indigent. In compliance with that Order, Michael A. Seidman, Esquire, of Philadelphia, was appointed counsel for appellant. Mr. Seidman concluded that no arguably meritorious issues existed for appellant in her PCHA petition, whereupon he was instructed by the lower court to adopt the following procedure:

> Counsel was instructed that where he had completed a comprehensive review of the entire record and the applicable law, and had interviewed defendant and concluded that the record

> was devoid of arguably meritorious contentions, counsel should write this court in letter form detailing not only the nature and extent of his review, but also listing each issue Defendant wished to have raised, followed by an explanation why those issues were meritless. At that point, this Court would conduct its own independent review and, if our conclusions coincided with counsel's the Petition would be dismissed without a hearing and the Defendant would be apprised of her appellate rights. Opinion Blake, J. at 5.

Counsel adhered to those guidelines and wrote the following letter to the court:

> I have reviewed the Notes of Testimony in the above matter and I have met with the defendant to discuss her Post Conviction Hearing Act Petition. I cannot find any issues to raise on her behalf that are of arguable merit. In addition, my client, Mrs. Finley, did not find any issues that she wished to raise other than the issues raised in her pro se petition. One of these issues deals with the sufficiency of the evidence. The Commonwealth's evidence consisted primarily of eyewitness testimony. The sufficiency of that testimony was a matter of credibility which was decided against the defendant by the waiver Judge. The other

> issue involved the search warrant which was finally litigated on direct appeal to our Supreme Court. See 383 A.2d 898 (1978). Consequently, I respectfully request to be relieved of my appointment in this matter.

Mr. Seidman was thereafter relieved, and the Petition was dismissed. New counsel was appointed to represent appellant in the instant appeal from that order.

In this appeal, appellant claims that she was denied effective assistance of counsel where the PCHA court-appointed counsel, Mr. Seidman, failed to file an amended PCHA petition and brief on behalf of his client and chose instead to outline for the court reasons why a PCHA petition would be meritless. We hold that the procedure followed below resulted in ineffectiveness of counsel. Accordingly, we vacate the order below and remand for present counsel to represent appellant in the filing of an amended PCHA petition.

Pennsylvania law concerning procedures to be followed when a court-appointed attorney sees no basis for an appeal is derived from the seminal case of Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967) rehrg. denied at 388 U.S. 924, 87 S.Ct. 2094. The Court in Anders applied a three-pronged formula, which, if scrupulously applied, will allow court-appointed counsel to withdraw from a case. If the attorney, after a conscientious evaluation of the record, finds his case to be "wholly frivolous", he may so advise the court and request permission to withdraw. He must, however, accompany his request with a brief referring to anything in the record which will "arguably" support an appeal. A copy of that brief should then be furnished to the indigent within enough time to allow the latter to pursue an appeal, either counselled or pro se. The court, after a full examination of the record, then decides

whether the case is wholly frivolous; and, if it so finds, it may grant counsel's request to withdraw. The procedure outlined above allows for the situation where counsel believes an appeal would be wholly frivolous but concurrently provides safeguards for the right of an indigent to enjoy the same zealous representation available to defendants able to afford private counsel.

Anders was adopted in Pennsylvania in Commonwealth v. Baker, 429 Pa. 209, 239 A.2d 201 (1968), wherein Anders was read as offering two choices to the court-appointed advocate: (1) he may file briefs and argue the case on behalf of his client as an advocate; or (2) he may choose to withdraw his services, in which case he must adhere to the Anders procedure.

Baker involved an appeal to the Supreme Court after relief was denied by our court. The instant case, however, arises from

appellant's initial PCHA petition. The threshold inquiry must be, therefore, whether Anders applies; if we answer affirmatively, only then may we evaluate whether its requirements are met.

Commonwealth v. Lohr, ___ Pa. ___, 468 A.2d 1375 (1983) arose as a result of appellant's filing a second PCHA petition after the time for appeal from the Superior Court's denial of relief from his first PCHA petition had passed. The Superior Court had affirmed the dismissal, without hearing, of appellant's second PCHA petition, and the appellant proceeded pro se to the Supreme Court armed, inter alia, with a fresh claim of ineffectiveness, which the Court chose to address. Appellant contended that appointed PCHA counsel was ineffective in failing to amend appellant's first pro se post-conviction petition and in failing adequately to pursue, as ordered, an appeal to the

Supreme Court. The majority prescribed application of Commonwealth v. McClendon, 495 Pa. 467, 434 A.2d 1185 (1981) in a case where counsel believes appeal is frivolous.

McClendon was a direct appeal where the court held that the requirements of Anders must be met. The Court felt obliged to determine whether the lower court was correct in its assessment of complete frivolity. It was only after it made that determination that the Court inquired as to whether the brief submitted complied with Anders. Under the circumstances, it found that compliance was unnecessary.[1] In affirming, the Court says

> "[t]he major thrust of Anders was to assure a careful assessment of any available claims that an indigent might have. That end is achieved by requiring counsel to conduct an exhaustive examination

---

[1] See page [14B], infra.

> of the record and by also placing the responsibility on the reviewing court to make an independent determination of the merit of the appeal.... Once we are satisfied with the accuracy of counsel's assessment of the appeal as being wholly frivolous, counsel has fully discharged his responsibility." at 1188.

Although the Court in Lohr held that counsel's actions were outside the requirements of McClendon, in which the court echoes Anders, it, nevertheless, affirmed, stating that

> "... the goal pursued by McClendon, review of the merit of the appeal, is fulfilled by the instant review, negating the possibility of prejudice inuring to appellant from the omissions of counsel. Furthermore, notwithstanding counsel's dereliction, any relief this Court might extend to appellant would be merely duplicitous [sic] of the instant review and, thus, consistent with principles of judicial economy, we decline the opportunity to remand for proceedings consistent with McClendon." (Emphasis added) at 1379.

Anders has been applied in similar circumstances, and, therefore, we hold

that its application to the instant case is proper. Counsel's brief does not satisfy the requirements of Anders in that it does not set forth any issues of arguable merit, nor is there evidence that it was provided to appellant within enough time for her to proceed pro se or to obtain new counsel. Notwithstanding these deficiencies, McClendon and Lohr offer us the opportunity to review the merits of the appeal. We decline, however, to follow the procedures utilized in McClendon and Lohr. We take a position which distinguishes this case from Lohr, based in part on the rationale behind the Supreme Court's remand for appointment of counsel.

The Supreme Court remanded, not because it saw any particular merit to the two contentions at issue, which were identical to those disposed of earlier in appellant's direct appeal. The Court stated, in remanding appellant's first

PCHA appeal, "[c]ounsel for a PCHA petitioner can more ably explore legal grounds for complaint, investigate underlying facts, articulate claims for relief and promote efficient administration of justice." Commonwealth v. Finley, 497 Pa. 332, 440 A.2d 1183, 1184 (1981). The Supreme Court wished to afford appellant the opportunity to amass other issues with arguable merit. It is obvious that the issues listed by appellant in her pro se petition were meritless as they had previously been so described by the Pennsylvania Supreme Court. Moreover, Pa.R. Crim.P. 1504, in affording counsel, means that counsel should act as an advocate in fulfilling his role.

> "... it is not enough simply for the PCHA court to appoint counsel. For this settled rule 'also envisions that counsel so appointed shall have the opportunity and in fact discharge the responsibilities required by representation.'" Commonwealth v. Lowenberg, 493 Pa.

231, 425 A.2d 1100 (1981) quoting from Commonwealth v. Fiero, 462 Pa. 409, 413, 341 A.2d 448, 450 (1975).

Fiero involved an appellant-authored PCHA petition filed after counsel was appointed and prior to which there had been no direct appeal taken. Since counsel had neither amended the petition nor filed a brief, the court held that "[t]hese facts compel the conclusion that the proceeding was in fact uncounselled." Id. at 450. The court required "meaningful participation by counsel."

If we were to hold that the requirements of Anders were not met but concomitantly review the merits of the appeal and possible affirm as in McClendon, we would run into a further obstacle. The affirmance which was the outcome of McClendon was based on the "accuracy of counsel's assessment of the appeal", including "an exhaustive examination of the record",

Commonwealth v. McClendon, supra, at 1188.

Here, there is no mention of an exhaustive search nor the required finding that the case is wholly frivolous.[2] Counsel must certify to an exhaustive reading and endeavor to uncover all possible issues for review so that the frivolity of the appeal may be determined by the lower court, or, as in Lohr, at the appellate level.[3]

---

[2] Progeny of Anders have provided us with a continuum of degrees of "meritless". Counsel's request to withdraw may only be granted if the court finds the case to be "wholly frivolous"; it may not be entertained if the appeal merely has "arguable merit" nor if it lacks merit. Mere absence of merit is not enough to support a request to withdraw or the granting of it. Commonwealth v. Greer, 455 Pa. 106, 314 A.2d 513 (1974); Commonwealth v. Worthy, 301 Pa. Super. 46, 446 A.2d 1327 (1982).

[3] It should be noted, in view of the fact that the Lohr Court chose to review the case on the merits, that Lohr involved a second PCHA petition, whereas this case

(Footnote 3 continued on next page.)

In the instant case, notwithstanding the fact that the pro se petition raised identical issues to those raised on direct appeal, we have a mandate from the Supreme Court with express instructions to appoint counsel and allow appellant to "... upon request, amend her petition." This remand carries with it a strengthening obligation to assess the quality of appellant's case in an arena wherein she is accompanied by a zealous advocate.

In accordance with the spirit of Lohr and McClendon and the manner in which they were disposed of on appeal, it should be

---

(Footnote 3 continued from previous page.)

involved the dismissal of the first post-conviction petition. The Court was concerned with considerations of judicial economy. Additionally, the attorney in Lohr apparently submitted a short petition to appellant which he rejected in favor of his own. The issues which he presented are evaluated by the Court.

noted that McClendon reduces the Anders requirements to a pratical level.

> "If ... 'wholly frivolous' means that there are no points present that 'might arguably support an appeal' counsel is saddled with an impossible burden, if he is nevertheless required to file a brief containing arguments that are non-existent. If on the other hand, there are claims of arguable merit, even though counsel may not have any confidence in them, ... the appeal is not 'wholly frivolous' and counsel is not entitled to seek leave to withdraw." Id. at 1188.

Here, without anything more than "the bare record available in the Superior Court" (Appellant's Brief at 19), appellant's present counsel has been able to list several issues which may have arguable merit. It is certainly conceivable that those same issues would have captured the attention of prior counsel upon an "exhaustive" reading of the record. (Indeed, it should be noted that Mr. Seidman only admits to having read

the Notes of Testimony).[4] Here, the "no-merit letter" is insufficient in light of the fact that there appear to be arguably meritorious issues, and the sufficiency of counsel's perusal of the record is not reflected.

It is also possible that appellant was never informed of her right to proceed pro se as she contends she was never given a copy of the letter written by counsel. The court in Commonwealth v. Baker, supra, states that the third requirement of Anders is the most important. "Anders clearly commands ... that the client be given a copy of counsel's brief in time to present the appeal in propria persona." Id. at 203.

---

[4] Moreover, counsel states in his letter that the sufficiency issue was a matter of credibility for the Judge and that the other issue was finally disposed of by the Supreme Court when, in fact, both issues were before that Court.

Since the procedures utilized herein were defective, they acted to deprive appellant of her right to adequate representation. We remand for an evidentiary hearing on the claims raised in appellant's brief and any other issues discerned by counsel after an exhaustive search of the record in accordance with this opinion. Jurisdiction is relinquished.

ROWLEY, J. notes his dissent.

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

TRIAL DIVISION - CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA	:	MAY TERM, 1975
vs.	:	
DOROTHY FINLEY	:	NOS. 1128-1132

OPINION AND ORDER

BLAKE, J. FILED: February 22, 1983

This matter is before the Court on Defendant's Petition for Relief under the Post Conviction Hearing Act. 42 Pa.C.S.A. 9541 et seq. Following careful review of the entire record and of the applicable law, we are convinced that this Petition must be dismissed after the appointment of counsel and without a hearing.

Defendant was arrested on April 18, 1975 and charged with robbery, carrying firearms on a public street, unlawfully carrying a firearm without a license,

carrying firearms without a license in a vehicle, possessing the instruments of crime generally, possessing a concealed weapon, possessing a prohibited offensive weapon, criminal conspiracy, murder, voluntary and involuntary manslaughter. On October 14, 1975 the Defendant waived her right to trial by jury, immediately proceeded to trial before the Honorable Armand Della Porta and was found guilty of robbery, carrying firearms without a license in a vehicle, possessing the instruments of crime generally, possessing a prohibited offensive weapon, criminal conspiracy, and second degree murder. Timely post-trial motions were heard and denied on February 26, 1976, and the Defendant was sentenced to concurrent terms of not less than ten (10) nor more than twenty (20) years imprisonment on Bill No. 1128, not less than one (1) nor more than two (2) years imprisonment on Bill No. 1130, not less

than five (5) nor more than ten (10) years imprisonment on Bill No. 1131 and a term of life imprisonment on Bill No. 1132. Sentence was suspended on Bill No. 1129.

Defendant pursued an unsuccessful direct appeal to the Supreme Court of Pennsylvania which, on March 23, 1978, affirmed the judgment of sentence, per curiam. Commonwealth vs. Finley, 477 Pa. 211, 383 A.2d 898 (1978).

On April 9, 1979 the Defendant filed, pro se, the instant PCHA Petition for Relief. However, in an Opinion and Order dated September 28, 1979, this Court denied Defendant's Petition without the appointment of counsel and without a hearing, on the ground that the two (2) issues forwarded in the pro se Petition were identical to those raised and denied on direct appeal before the Supreme Court of Pennsylvania, and had therefore been finally litigated under 19

P.S. 1180-4 [now 42 Pa.C.S.A. 9544(A)] of the former PCHA statute.

Defendant pursued a counseled appeal from the denial of PCHA relief to the Superior Court of Pennsylvania which, on May 8, 1980, transferred the appeal to our Supreme Court. On December 24, 1981 our Supreme Court vacated the September 28, 1979 Order of this Court and remanded with "... instructions to determine whether appellant was indigent and if so to appoint counsel. If it is determined that appellant is entitled to the appointment of counsel, she may, upon request, amend her petition." Commonwealth vs. Finley, 497 Pa. 332, 335, 440 A.2d 1183, 1184-85 (1981). A Commonwealth Petition for Reargument was denied on January 29, 1982.

Consequently, this Court complied with the Supreme Court directive and appointed counsel, Michael A. Seidman, Esquire. Mr. Seidman reviewed the Quarter Sessions file,

the notes of testimony, issues of fact and law which Defendant herself had raised, independently reviewed the file and notes for the existence of any additional issues of fact or law which could arguably entitle Defendant to post-conviction relief, and met with Defendant Finley. Upon concluding that absolutely no issues of arguable merit could be found, Mr. Seidman looked to this Court for guidance regarding his duties in this situation.

It had previously been clear that the two issues that Defendant presented in her pro se Petition had been finally litigated to her detriment on direct appeal and, therefore, could not be resurrected in a post-conviction proceeding. 42 Pa.C.S.A. 9544(A)(3).

It is axiomatic that in post-conviction proceedings, counsel cannot be found incompetent or ineffective for failing to raise meritless claims. Commonwealth vs.

Johnson, 490 Pa. 312, 416 A.2d 485 (1980); Commonwealth vs. Hubbard, 472 Pa. 259, 372 A.2d 687 (1977). Counsel's responsible refusal to forward meritless claims preserves the just policy of hearing cases and controversies expeditiously.

A PCHA Court may not only dismiss without a hearing contentions finally litigated [42 Pa.C.S.A. 9544(a)], or waived [42 Pa.C.S.A. 9544(B)], but may also deny and dismiss without a hearing contentions which are "'patently frivolous' and [are] without a trace of support either in the record or from other evidence submitted by the Petitioner." [42 Pa.C.S.A. 9549(B)]. Therefore, it is clear that no PCHA Petitioner, first-time or otherwise, may assert an absolute entitlement to an evidentiary hearing. Commonwealth vs. Hayden, 224 Pa. Super. 354, 356, 307 A.2d 389, 390 (1973).

Instantly, the facts are as follows. Following the above-mentioned remand by

our Supreme Court, court-appointed counsel Seidman reviewed the notes of testimony, Quarter Sessions file, issues of fact and law forwarded by Defendant herself, spoke with Defendant, conducted his own review for contentions which only a trained legal mind would discover, and concluded that no arguably meritorious issues existed. He then sought advice from this Court.

Counsel was instructed that he must take his client as he finds her; that the mere fact of having been appointed to represent a pro se Petitioner could not guarantee the existence of arguable contentions which might entitle the Defendant to post-conviction relief; that acceptance of the responsibility of a court-appointment in no way requires that he "find" an issue (e.g., manufacture an issue or present an issue not arguably meritorious); and that he must proceed as a responsible advocate and exercise his best professional judgment.

Counsel was instructed that where he had completed a comprehensive review of the entire record and the applicable law, and had interviewed Defendant and concluded that the record was devoid of arguably meritorious contentions, counsel should write this Court in letter form detailing not only the nature and extent of his review, but also listing each issue Defendant herself wished to have raised, followed by an explanation why those issues were meritless. At that point, this Court would conduct its own independent review and, if our conclusions coincided with counsel's, the Petition would be dismissed without a hearing and Defendant would be apprised of her appellate rights.

Here, this procedure was followed and the Petition was dismissed without a hearing. Counsel was relieved with new counsel appointed to prosecute the instant appeal.

In Commonwealth vs. Lowenberg, 493 Pa. 232, 425 A.2d 1100 (1981), our equally-divided Supreme Court addressed the issue of the responsibility of court-appointed PCHA counsel upon counsel's determination that no arguably meritorious issues existed. Although the Court's numerous Opinions in Lowenberg's case are without binding precedential value, we find persuasive the statement of Mr. Justice Nix that the landmark case of Anders vs. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed. 2nd 493 (1976), which outlines to court-appointed counsel the manner in which counsel must proceed as an active advocate, rather than as mere amicus curiae, properly applies to first direct appeals, and implicitly not to collateral attacks such as post-conviction proceedings. 493 Pa. at 239, 425 A.2d at 1101. We also find persuasive the statement of Mr. Justice Flaherty that "the Post Conviction Hearing Act was not intended to

eliminate the finality of criminal convictions by allowing defendants to invoke an endless series of collateral proceedings." 493 Pa. at 236, 425 A.2d at 1102.

Furthermore, in the precedent case of Commonwealth vs. McClendon, 495 Pa. 467, 434 A.2d 1185 (1981), our Supreme Court addressed the issue of what an attorney representing an indigent on direct appeal must do, when the attorney concludes that no arguably meritorious issues exist and then requests permission to withdraw as counsel. The Court was logically and constitutionally compelled to define the roles of the appellate court and of counsel consistent with the holding of Anders vs. California, supra.

The McClendon Court recognized the distinction between issues arguably meritorious yet unlikely to succeed, and issues totally lacking in arguable merit. 495 Pa. at 472-473, 434 A.2d at 1187. The Court

concluded that "... Anders does not require that counsel be forced to pursue a wholly frivolous appeal just because his client is indigent" and that "once we are satisfied with the accuracy of counsel's assessment of the appeal as being wholly frivolous, counsel has finally discharged his responsibility." 495 Pa. at 473, 343 A.2d at 1188.

We agree with the Court's further conclusion that "[T]he role of an advocate, insisted upon in Anders, refers to the manner in which the record was examined in an effort to uncover grounds to support the appeal." 495 Pa. at 473, 343 A.2d at 1188.

With McClendon, supra, in mind, this Court addressed the issue of what appointed counsel representing an indigent must do in a collateral proceeding, where a comprehensive review of the entire record and applicable law, and an interview with Defendant, results in the determination that the PCHA

Petition for Relief is devoid of issues of arguable merit. Under the PCHA Statute, this would occur where counsel finds nothing suggesting a conviction attained, or a sentence imposed, without due process of law (42 Pa.C.S.A. 9542); where neither the Defendant nor the record forwards any contention which, if proven, would establish eligibility for relief (42 Pa.C.S.A. 9543); where all issues have been either finally litigated [42 Pa.C.S.A. 9544(A)]; or waived [42 Pa.C.S.A. 9544(B)]; or where contentions were patently frivolous or fully litigated following an evidentiary hearing at the original trial or at any later proceeding [42 Pa.C.S.A. 9549(B)].

Therefore, following receipt of counsel's letter concluding that arguably meritorious issues were non-existent and listing Defendant's contentions followed by a statement explaining their meritlessness, this Court conducted its independent

review, concurred in counsel's conclusions, and dismissed this Petition without a hearing.

We believe that the aforementioned procedure is wholly consistent with safeguarding the rights of Defendant, the purpose and integrity of post-conviction law and proceedings, and the integrity and professionalism of court-appointed counsel. Furthermore, in so writing this Court following the unsuccessful search for arguably meritorious issues, counsel cannot be criticized for proceeding as mere amicus curiae where, until the end of his investigation, counsel vigorously researched the entire record and applicable law as an advocate in Defendant's behalf. To hold otherwise is to compel the presentation of frivolous issues, the forwarding of which distorts the nature and ends of law, debases the legal profession, disregards the integrity of the judicial

process, and alienates our citizenry, all without benefiting the immediate object of our attention -- the indigent Defendant seeking post-conviction relief.

Therefore, since it is clear that the instant Petition forwards no grounds upon which post-conviction relief can be granted, it is hereby dismissed after the appointment of counsel and without a hearing.

Accordingly, and in light of the foregoing, we enter the following

O R D E R

AND NOW, TO WIT, this 7th day of October, 1982, Defendant's Petition for Relief under the Post Conviction Hearing Act is hereby denied after the appointment of counsel and without a hearing.

BY THE COURT:

/s/
Blake, J.